(4)

No. 88-348

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

CHARLES FRIED
Solicitor General

DAVID L. SHAPIRO
Special Assistant to the Attorney General

RICHARD J. LAZARUS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor
Federal Energy Regulatory Commission
Washington, D.C. 20426

2 1/2

QUESTION PRESENTED

Whether a federal court should wholly abstain from adjudicating a claim, brought by a public utility against a local regulatory authority, that the authority is violating federal law by refusing to honor terms fixed by the Federal Energy Regulatory Commission for the interstate sale of electric power at wholesale.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Alabama Pub. Serv. Comm'n v. *Southern Ry.*, 341 U.S. 341 (1951)	11
Aluminum Co. of America v. *Utilities Comm'n*, 713 F.2d 1024 (4th Cir. 1983), cert. denied, 465 U.S. 1052 (1984)	17
American Elec. Power Co. v. *Kentucky Pub. Serv. Comm'n*, 787 F.2d 588 (6th Cir. 1986), cert. denied, 481 U.S. 1023 (1987)	5, 16
Appalachian Power Co. v. *Public Serv. Comm'n*, 614 F. Supp. 64 (S.D. W. Va.), aff'd, 770 F.2d 159 (4th Cir. 1985), on remand, 630 F. Supp. 656 (S.D. W. Va. 1986), aff'd, 812 F.2d 898 (4th Cir. 1987)	17
Appalachian Power Co. v. *Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987)	12
Babbitt v. *United Farm Workers*, 442 U.S. 289 (1979)	15
Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943)	3, 10
Catrone v. *Massachusetts State Racing Comm'n*, 535 F.2d 669 (1st Cir. 1976)	15
Colorado Interstate Gas Co. v. *Federal Power Comm'n*, 324 U.S. 581 (1945)	13
Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976)	10
Cox Cable Communications, Inc. v. *Simpson*, 569 F. Supp. 507 (D. Neb. 1983)	15
England v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964)	11-12
Fujikawa v. *Gushiken*, 823 F.2d 1341 (9th Cir. 1987)	15
Gibson v. *Berryhill*, 411 U.S. 564 (1973)	13
Hagans v. *Lavine*, 415 U.S. 528 (1974)	14
Huffman v. *Pursue, Ltd.*, 420 U.S. 592 (1975)	12, 20

Cases—Continued: Page

Juidice v. *Vail*, 430 U.S. 327 (1977) 12
Kentucky West Va. Gas Co. v. *Pennsylvania Pub. Utility Comm'n*, 791 F.2d 111 (3d Cir. 1986) 13, 16
Kremer v. *Chemical Constr. Co.*, 456 U.S. 461 (1982) 20
Lake Carriers' Ass'n v. *MacMullan*, 406 U.S. 498 (1972) 13
Middle South Energy v. *Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 18, 1986) 5
Middle South Energy, Inc., 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd *sub nom. Mississippi Indus.* v. *FERC*, 808 F.2d 1525, reh'g granted and vacated in part, 822 F.2d 1104 (D.C. Cir. 1987), cert. denied, No. 86-1380 (Dec. 14, 1987) 2, 12
Middle South Energy, Inc. v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985), cert. denied, 474 U.S. 1102 (1986) 12, 16
Middlesex County Ethics Comm. v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982) 12
Mississippi Power & Light Co. v. *Mississippi*, No. 86-1970 (June 24, 1988) 1, 11, 12
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986) 12, 16
NOPSI v. *City of New Orleans*, No. 85-3398 (E.D. La. Sept. 16, 1985) 3
NOPSI v. *City of New Orleans*, 782 F.2d 1236, modified, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987) 4, 5, 9, 10
NOPSI v. *Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987) 6
Ohio Civil Rights Comm'n v. *Dayton Christian Schools Inc.*, 477 U.S. 619 (1986) 12
Pennzoil Co. v. *Texaco, Inc.*, No. 85-1798 (Apr. 6, 1987) 14, 20
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 13
Romany v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984) 15
Silverman v. *Barry*, 727 F.2d 1121 (D.C. Cir. 1984) 11
Spartacus, Inc. v. *Borough of McKees Rocks*, 694 F.2d 947 (3d Cir. 1982) 15

Cases—Continued: Page

System Energy Resources, Inc., 41 F.E.R.C. ¶ 61,238 (1987), appeal pending, No. 88-1067 (D.C. Cir.) 2
Trainor v. *Hernandez*, 431 U.S. 434 (1977) 12
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 14
Western Air Lines v. *Board of Equalization*, 480 U.S. 123 (1987) 13
Younger v. *Harris*, 401 U.S. 37 (1971) 4, 12
Zablocki v. *Redhail*, 434 U.S. 374 (1978) 11

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 7
Art. VI, Cl. 2 (Supremacy Clause) 14
Amend. XIV 14
Federal Power Act, 16 U.S.C. (& Supp. IV) 824 *et seq.* ... 7, 9
Johnson Act, 28 U.S.C. 1342 ..... 3, 4

Miscellaneous:

P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* (3d ed. 1988) 15
Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193 15
Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 Cornell L. Rev. 65 (1977) .. 15

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-348

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Petitioner, New Orleans Public Service, Inc. (NOPSI), is one of four operating electric utility companies that are wholly-owned subsidiaries of Middle South Utilities, Inc. (MSU).[1] The other subsidiary companies, each of which

---

[1] This Court's decision last Term in *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970 (June 24, 1988), arose out of the same transactions underlying the instant dispute; those transactions are described more fully in the Court's opinion in that case. See slip op. 1-9.

sells electric power at retail to its own local customers, are Louisiana Power & Light (LP&L), Mississippi Power & Light Company (MP&L), and Arkansas Power & Light Company (AP&L). A generating subsidiary, Middle South Energy (MSE), was formed to own and finance two nuclear power plants, Grand Gulf 1 and 2, and to sell power from those plants to the operating companies.

In June 1985, the Federal Energy Regulatory Commission (FERC) approved wholesale rates for power from Grand Gulf 1 and allocated its capacity and energy among the four operating companies. See *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd *sub nom. Mississippi Indus.* v. *FERC*, 808 F.2d 1525, reh'g granted and vacated in part, 822 F.2d 1104, 1105 (D.C. Cir.), cert. denied, No. 86-1380 (Dec. 14, 1987).[2] FERC rejected the New Orleans City Council's contention that NOPSI's share of Grand Gulf 1 costs should be 9 percent (see Pet. App. 30A-31A n.11; Br. in Opp. 4-5 n.4). FERC instead concluded that the operating companies should share in the system's total investment in nuclear capacity "roughly in proportion to each company's share of System demand" (31 F.E.R.C. at 61,655-61,656). FERC ordered the following allocation of Grand Gulf 1 costs: AP&L, 36 percent; LP&L, 14 percent; MP&L, 33 percent; and NOPSI, 17 percent (*ibid.*). MSE has accordingly billed NOPSI for 17 percent of the costs since Grand Gulf 1 went into service on July 1, 1985.

The City Council of New Orleans regulates NOPSI's retail rates. On May 17, 1985, NOPSI applied for a retail

[2] The District of Columbia Circuit remanded the case to FERC to consider issues relating to the correctness of its allocation of certain Grand Gulf 1 costs. See 822 F.2d 1104. On remand, FERC reaffirmed, with further explanation, its prior allocation. See *System Energy Resources, Inc.*, 41 F.E.R.C. ¶ 61,238 (1987), appeal pending, No. 88-1067 (D.C. Cir.).

rate increase to reflect the Grand Gulf 1 costs that it would be required to pay under the FERC allocation. The instant case is the third in a series of lawsuits that NOPSI has brought in federal district court against the Council of the City of New Orleans, based on the Council's refusal to allow NOPSI to recover its Grand Gulf 1 costs in its retail rates.

2. a. *NOPSI I*: On July 17, 1985, the Council announced a public hearing, to be held on July 25, 1985, to consider whether interim rate relief for NOPSI was warranted (Res. R-85-423). The Council stated that the issue of interim rate relief needed to be addressed because "various factors, including questions as to the legality and prudency of the [contracts relating to Grand Gulf 1], the prudency and reasonableness of the said expenses, and lack of information on certain relevant matters, prevent the Council from either denying or granting the requested rate relief at the present time" (*ibid.*).

On August 2, 1985, NOPSI filed a complaint in federal district court seeking declaratory and injunctive relief, and money damages (86-546 Pet. App. 37A). NOPSI asked the court, inter alia, to issue preliminary and permanent injunctions enjoining the Council from denying NOPSI recovery, through its retail rates, of its FERC-allocated share of the expenses of Grand Gulf 1. The Council denied NOPSI's request for interim rate relief on September 5, 1985 (Res. R-85-5261).

On September 16, 1985, the district court granted the Council's motion to dismiss. *NOPSI* v. *City of New Orleans*, No. 85-3398 (E.D. La.). The court held that dismissal was warranted under the Johnson Act, 28 U.S.C. 1342, and under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention was appropriate, the court explained, because NOPSI's rate increase was a matter of local concern requiring local administrative expertise and

because the Council's actions would not directly conflict with FERC's order.

While the district court's ruling was pending on appeal, the Council and NOPSI entered into a settlement agreement with respect to the treatment of Grand Gulf 1 costs (Res. R-86-112). The agreement set out in detail the amounts by which NOPSI could increase its rate base annually until the costs of Grand Gulf 1 were fully recovered. Pursuant to the agreement, NOPSI also agreed permanently to absorb $51.2 million of the costs (*id.* at 4). Both sides purported to reserve their legal rights, including the Council's right to investigate the issue of prudence (*id.* at 11-12).

On appeal, the court of appeals initially reversed both aspects of the district court's ruling,[3] but on its own motion for reconsideration subsequently reversed itself on the abstention issue. See *NOPSI* v. *City of New Orleans*, 782 F.2d 1236, modified, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987). The court concluded that *Burford* abstention was appropriate because "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise" (798 F.2d at 862). The court also held that abstention was appropriate under *Younger* v. *Harris*, 401 U.S. 37 (1971), because there was an ongoing administrative proceeding before the Council: "NOPSI would have a full and fair opportunity to litigate its federal

[3] See *NOPSI* v. *City of New Orleans*, 782 F.2d 1236 (5th Cir. 1986). The court concluded that the Johnson Act did not apply because NOPSI's request for injunctive relief rested on a "statutorily-based preemption claim" and therefore did not rest solely on the " 'repugnance of the order to the Federal Constitution,' " within the meaning of the Johnson Act (782 F.2d at 1242, quoting 28 U.S.C. 1342)). The court similarly concluded that *Burford* abstention was inappropriate where, as in this case, "the claim presented is predicated upon federal preemption" (782 F.2d at 1243).

claims" through the state appellate process, and there were no exceptional circumstances, such as bad faith or harassment, that rendered abstention improper (798 F.2d at 864).

NOPSI petitioned for a writ of certiorari, and, in response to this Court's invitation in a case raising a related issue (see *American Elec. Power Co.* v. *Kentucky Pub. Serv. Comm'n*, cert. denied, 481 U.S. 1023 (1987)), the United States and FERC filed a brief as amici curiae urging the Court to grant NOPSI's petition. Although we noted in our submission that the case was "blemished by procedural problems" because of the settlement agreement entered into between NOPSI and the City Council (86-49 U.S. Br. 23), we contended the abstention issue remained sufficiently concrete to warrant review. The Court, however, denied NOPSI's petition.

b. *NOPSI II*: While *NOPSI I* was pending before the court of appeals, the Council announced on October 10, 1985, that it would conduct a prudence investigation into NOPSI expenditures on Grand Gulf 1 and requested that NOPSI answer a lengthy series of questions posed by the Council (Res. R-85-636). On November 11, 1985, NOPSI filed a second lawsuit in federal district court in which it sought to enjoin the investigation. NOPSI subsequently amended its complaint to seek an injunction or a declaratory judgment only to the extent that the Council proposed taking any action to require NOPSI or its shareholders to absorb all or a portion of the cost of Grand Gulf 1 allocated to NOPSI by FERC.

The district court dismissed NOPSI's complaint. See *MSE* v. *Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 18, 1986). The court ruled, first, that NOPSI's claims were not ripe because it was not clear whether the Council intended to proceed in a manner contrary to federal law. The court next ruled, in the alternative, that both *Younger* and *Burford* abstention were appropriate.

On appeal, the court of appeals affirmed. See *NOPSI* v. *Council of New Orleans,* 833 F.2d 583 (5th Cir. 1987). The court recognized that the Council's prudence investigation could "certainly be interpreted as directed towards areas now off-limits to state regulators" (*id.* at 586). The court nonetheless concluded that NOPSI's request for an injunction was not ripe because the Council's inquiry presented "only a possibility of harm to NOPSI. If such harm occurs, the validity of the New Orleans City Council's action will depend on facts not yet in existence" (*id.* at 588). NOPSI would suffer no irreparable injury, the court explained, pending completion of the Council's prudence inquiry (*ibid.*). The court of appeals did not address the district court's abstention ruling.

c. *NOPSI III*: On February 4, 1988, the Council issued a rate order based on its completed prudence inquiry. The Council found: (1) "NOPSI's oversight and review of its Grand Gulf obligation was uncritical and severely deficient"; (2) "NOPSI made no effort to reduce its risk exposure in the wake of the Three Mile Island Nuclear incident in 1979-80, which demonstrated the risks of operating a nuclear reactor"; and (3) "NOPSI imprudently failed to reduce the risk of its Grand Gulf commitment by selling a portion of its share of the power off-system, that is, to some other user." Pet. App. 8A. Based on these findings, the Council disallowed $135 million of NOPSI's deferred Grand Gulf costs and required NOPSI to deduct that amount from its rate base (*id.* at 24A). In order to reflect the disallowance, the Council also reduced rate increases then planned for NOPSI (*ibid.*). The Council explained, however, that the amount disallowed did not reflect the full extent of NOPSI's imprudence, because that amount would have caused NOPSI to become insolvent (*id.* at 9A). The Council had instead disallowed only that amount—minus an additional ten percent "buffer"—that it concluded NOPSI could absorb without becoming insolvent (*ibid.*).

NOPSI subsequently filed the instant action in federal district court, seeking a declaratory judgment and both preliminary and permanent injunctive relief from the Council's order.[4] NOPSI's complaint was based solely on federal grounds: its principal claim was that the order was preempted by federal law, and it contended that this claim fell within the exclusive jurisdiction of the federal courts under the Federal Power Act, 16 U.S.C. (& Supp. IV) 824 *et seq.*[5] NOPSI also argued that it would suffer irreparable harm absent preliminary injunctive relief because its inability to recover the $135 million in deferred Grand Gulf costs would reduce its common equity, eliminate its retained earnings, render it unable to sell rate recovery bonds, jeopardize its ability to continue to pay its FERC-mandated allocation of Grand Gulf costs, and make it unable to pay dividends on either preferred or common stock for at least five years.[6]

---

[4] Upon the issuance of the City Council's order, the Council and a local consumer organization, the Alliance for Affordable Energy, filed separate lawsuits in state court. In a suit against NOPSI and others, the Council sought a declaration that the Council's order represented a just and reasonable exercise of the Council's power and that NOPSI's failure to comply with the order would be unlawful. See *Boissiere* v. *Cain*, No. 88-2503 (Civ. Dist. Ct. Parish of Orleans, La., filed Feb. 4, 1988). In a suit against the City Council, the Alliance for Affordable Energy sought an order directing the Council to disallow NOPSI's recovery of additional Grand Gulf costs. See *Alliance for Affordable Energy, Inc.* v. *Council of New Orleans*, No. 88-2502 (Civ. Dist. Ct. Parish of Orleans, La., filed Feb. 4, 1988). The City Council named NOPSI as a "defendant in reconvention" in the second lawsuit and NOPSI removed both cases to federal district court. Both cases were later remanded pursuant to that court's subsequent decision to abstain. See Pet. App. 27A & n.6.

[5] The complaint also alleged that the Council's actions violated the Commerce Clause and were barred by doctrines of estoppel.

[6] NOPSI also filed a complaint (petition of appeal) in state court. NOPSI's state court complaint sought relief based on several state law

On March 10, 1988, the federal district court dismissed NOPSI's complaint (Pet. App. 22A-33A). The court agreed with NOPSI that the Johnson Act does not preclude federal court jurisdiction over the lawsuit (*id.* at 25A-26A), but concluded that federal courts do not have exclusive jurisdiction under the Federal Power Act over NOPSI's federal preemption claim and that both *Burford*

---

and federal constitutional grounds. NOPSI argued that the Council's rate order was unlawful under state law because it abrogated its settlement agreement with NOPSI, was not supported by substantial evidence in the record, and was based on an improper legal standard of prudence. NOPSI also argued that the order violated both the State and Federal Constitutions because it denied NOPSI due process and constituted a taking of property without just compensation. NOPSI's state law complaint, however, did not seek relief based on NOPSI's federal preemption claim. Nor did it seek preliminary injunctive relief. In a letter to the state court that accompanied its state court filing, NOPSI notified the court of the pendency of its federal court lawsuit against the City Council and explained that it was filing with the state court in order to avoid later being barred by the applicable state limitations period. NOPSI also explained that it had not included its federal preemption claim because the federal courts had exclusive jurisdiction over that claim, but that it wished to reserve the right to include that count in its state complaint should the federal court subsequently dismiss NOPSI's federal lawsuit.

Following the federal district court's dismissal of NOPSI's action on abstention grounds, NOPSI amended its state court complaint to include a federal preemption argument and also filed a motion for preliminary injunctive relief based solely on its claim of federal preemption. The state trial court denied NOPSI's motion for preliminary relief on May 5, 1988, and NOPSI's appeal of that ruling is now pending before a state appellate tribunal, which denied NOPSI's request for expedited appeal. See *NOPSI* v. *Council of New Orleans*, No. 88-CA-1369 (4th Cir. La. Ct. App.). The parties to the state trial court proceeding have since filed cross-motions in support of petitions for review and/or summary judgment on the merits, which are pending before that court. Oral argument on those motions was held on November 30, 1988.

and *Younger* abstention were appropriate (*id.* at 26A-33A).

The court of appeals affirmed (Pet. App. 2A-20A). In examining the appropriateness of abstention, it assumed that NOPSI could prove "as it alleges, with some apparent evidentiary support," that the Council's order " 'is beyond the Council's retail ratemaking authority and violates federal law' " because the order "results in 'trapping' [of] FERC allocated costs," and "was based on factors that the state could not legally consider" (*id.* at 11A). The court of appeals concluded that its prior "opinion in *NOPSI I* nonetheless requires us to uphold the district court's decision to abstain" (*id.* at 20A).[7]

DISCUSSION

Two Terms ago, we urged the Court to grant review in *NOPSI I*.[8] We contended then that the Fifth Circuit's abstention ruling was incorrect, conflicted with decisions of other courts of appeals, and raised important issues of federal law warranting a grant of certiorari. We recognized that an intervening settlement agreement between the parties had diminished somewhat the concreteness of the controversy, but concluded, on balance, that plenary review was appropriate. NOPSI's current petition raises similar abstention issues, but without the mootness claims that plagued *NOPSI I*. Because we continue to believe that the Fifth Circuit has misapplied this Court's precedent in abstaining from deciding the merits of NOPSI's preemption claim, because a circuit conflict persists on the issue,

---

[7] Like the district court, the court of appeals rejected NOPSI's argument that the Federal Power Act provides federal courts with exclusive jurisdiction over its preemption claim (see Pet. App. 11A-15A). That holding is not challenged in NOPSI's petition in this case.

[8] A copy of that earlier filing is attached to this brief.

and because additional matters of importance are raised on this record, we again urge the Court to grant further review.

1. The most recent decision of the Fifth Circuit in *NOPSI III*, like its prior decision in *NOPSI I*, is incorrect. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976). In our view, neither *Burford* nor *Younger* abstention is appropriate where, as in this case, the utility makes a substantial claim that a local regulatory authority has improperly "trapped" costs allocated to it by FERC pursuant to FERC's exclusive jurisdiction over the terms of sale of power among members of an interstate utility system. The independent interest of any single state in such an inherently interstate controversy is not sufficient to justify denying the federal plaintiff the choice of a federal forum. Moreover, even if it is determined that limited abstention is warranted, the district court should at the very least be required to consider whether interim relief is necessary to prevent irreparable harm to federally protected interests.

a. In *Burford*, the Court concluded that it would be best to "leave • • • problems of [state] law to the state court" in that case because of the great harm to state policies that might result from federal court misinterpretation of state law concerning the development, production, and conservation of interstate oil and gas resources (319 U.S. at 332; see *id.* at 327, 329-330, 331 & n.28, 333-334).[9] This case, in contrast, concerns the scope of federal regulatory law and policy. The federal question whether a particular FERC allocation must be honored by a local regulatory authority in a particular context is, moreover, qualitatively different from the type of broad and amor-

[9] Indeed, the state courts were described as "working partners with the [state] Railroad Commission in the business of creating a [state] regulatory system for the oil industry" (319 U.S. at 326).

phous due process claims raised in *Burford* and *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 347 (1951), which is the only case since *Burford* in which this Court has squarely upheld abstention on the basis of that decision.[10] In the present case, unlike those cases, any resulting disruption of state law or policy would be a deliberate result of an elaborate and comprehensive congressionally-enacted scheme. Congress determined that terms for the allocation of power and costs among members of a multistate public utility holding company should be conclusively resolved by a neutral federal administrative forum (FERC) in accordance with federal law. See *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970 (June 24, 1988), slip op. 16-17. Hence, *Burford* abstention is inappropriate in this class of cases because the underlying premise of abstention on that ground—the need to avoid disruption of state law or policy or to make determinations "predominantly local" in character—is missing. Cf. *Zablocki* v. *Redhail*, 434 U.S. 374, 379-380 n.5 (1978) ("there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy"); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-416 (1964) ("recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law"); *Silverman* v. *Barry*, 727 F.2d 1121, 1123-1124 n.4 (D.C. Cir. 1984).

[10] In *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, a railroad sought to enjoin a state commission's refusal to permit discontinuance of two intrastate trains; the railroad argued there that the commission's order constituted an unconstitutional deprivation of its property. The Court's requirement of abstention was based on its conclusion that the correctness of the challenged order depended on "predominantly local factors" (341 U.S. at 349).

b. *Younger* abstention is also inappropriate. The most "vital consideration" prompting *Younger* abstention is the "notion of 'comity', that is * * * the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways" (401 U.S. at 44). See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 626-627 (1986); *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982); *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 601 (1975). This notion—of allowing each state to perform its separate function—loses much of its force, however, when, as in this case, the interests of several states are at odds because of their participation in a multistate "common pool"; in such a case, a decision by the tribunals of any one state in favor of its citizens may have a corresponding direct adverse effect on citizens of other participating states. See *Mississippi Indus.* v. *FERC*, 808 F.2d at 1548-1549; *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898, 904-905 (4th Cir. 1987); *Middle South Energy, Inc.* v. *Arkansas Public Serv. Comm'n*, 772 F.2d 404, 416-417 (8th Cir. 1985), cert. denied, 474 U.S. 1102 (1986).[11] Unlike the federal claims at issue in *Younger* and its progeny, therefore, the claims in such inherently interstate disputes are not readily susceptible to resolution by leaving states "free to perform their separate functions in their separate ways." [12]

---

[11] The common pool may consist of shared benefits, as in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), or of shared burdens, as in this case and *Mississippi Power & Light Co.* See *Mississippi Power & Light Co.*, slip op. 18.

[12] For this same reason, there may also be some basis for questioning whether state fora can provide the unbiased decisionmaking upon

We do not contend that abstention is necessarily undesirable whenever a federal plaintiff raises a federal preemption claim. See *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 511-512 (1972) (abstention on claims of federal unconstitutionality and federal statutory preemption was warranted because resolution of the federal questions presented was " 'dependent upon, or may be materially altered by, the determination of an uncertain issue of state law' "). But federal preemption claims, turning as they frequently do on an understanding of a complex federal regulatory scheme, are often not appropriate for the exercise of deference to state tribunals. See, *e.g.*, *Kentucky West Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1116-1117 (3d Cir. 1986). Whether abstention is appropriate in a case involving a claim of federal preemption depends, among other things, on the relative significance of the preemption claim in the lawsuit, on its relation to issues of state law, and on the nature of the preemption argument. In our view, all of these factors render abstention inappropriate in this case. The preemption claim is dispositive of the merits of the lawsuit and, as described above, the nature of the preemption argument deprives the considerations underlying *Younger*, particularly the notion of comity, of substantial force. Cf. *Western Air Lines* v. *Board of Equalization*, 480 U.S. 123, 129-130 (1987) ("The general principle that * * * the meaning of words in a federal statute is a question of federal law has especial force when the purpose of the federal statute is to eliminate discriminatory state

---

which *Younger* abstention is predicated. Cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973). The City Council, for instance, is a popularly elected legislative body. When setting rates, its proceedings are not judicial; they are "essentially a legislative function." *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U.S. 581, 589 (1945); see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968).

treatment."); *Hagans* v. *Lavine*, 415 U.S. 528, 550 (1974) (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729 (1966) (" 'the federal courts are particularly appropriate bodies for the application of pre-emption principles' ").

Finally, contrary to the Council's claim (Br. in Opp. 3, 23), this Court's decision in *Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798 (Apr. 6, 1987), does not suggest otherwise. The Court in *Pennzoil* denied that it was "hold[ing] that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court" (slip op. 11 n.12). Abstention was appropriate in *Pennzoil*, the Court explained, only because it was needed to protect the "vital" state interest in enforcing the orders and judgments of state courts. The federal injunction sought in *Pennzoil* would have interfered with the execution of state court judgments and "would do so on grounds that challenge the very process by which those judgments were obtained" (slip op. 11). No comparable state interest is implicated in this case. Nor is the constitutional issue here—essentially a question of the preemptive effect of a federal statute under the Supremacy Clause—comparable to the Fourteenth Amendment due process claim that the decision in *Pennzoil* sought to avoid.

c. For all these reasons, we believe that abstention in this case is not warranted and that NOPSI's choice of a federal forum should be sustained. If it is determined, however, that limited abstention is appropriate, an important question is presented by NOPSI's request in this action for *preliminary* injunctive relief. That request, based solely on a claim of irreparable injury to a protected federal interest, should be entertained by the district court. If, as NOPSI claims, the denial of interim relief may, as a practical matter, result in the permanent trapping of costs and thus in the frustrating of federal policy, then such relief is necessary to vindicate that policy. At the same

time, the granting of interim relief would not, in itself, interfere with the ability of state tribunals to decide NOPSI's claims on their merits. It would only prevent the infliction of irreparable harm in the meantime.[13] In related contexts, this Court and lower courts have previously recognized or endorsed the appropriateness of a limited form of abstention, coupled with preliminary relief, in order to avoid irreparable harm. See, *e.g.*, *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 312 n.18 (1979) ("[T]his is a matter best addressed by the District Court in the first instance."); *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32, 45 n.13 (1st Cir. 1984); *Spartacus, Inc.* v. *Borough of McKees Rocks*, 694 F.2d 947, 949 & n.3 (3d Cir. 1982); *Catrone* v. *Massachusetts State Racing Comm'n*, 535 F.2d 669, 672 (1st Cir. 1976); *Cox Cable Communications, Inc.* v. *Simpson*, 569 F. Supp. 507, 515-522 (D. Neb. 1983); cf. *Fujikawa* v. *Gushiken*, 823 F.2d 1341, 1347 (9th Cir. 1987). See also P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1375, 1422-1423 (3d ed. 1988); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193, 277-278; Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 Cornell L. Rev. 65 (1977).

2. Further review is also warranted because the abstention issues are important and are the subject of a conflict in the circuits.

---

[13] As noted above (see note 6, *supra*), the state court denied NOPSI's request for preliminary relief and for an expedited appeal.

The question of preliminary relief in the present case is, of course, different from the question presented in *Pennzoil*. In that case, Texaco's entire federal claim was that it was constitutionally entitled to a stay of the trial court's judgment pending appeal; a federal court decision in Texaco's favor would have disposed of the very issue held appropriate for abstention.

a. At the time we filed our submission in *NOPSI I*, there was a conflict involving five circuits on the question of abstention. That conflict has persisted and, as before, is most starkly presented by comparing the opinions of the Third, Fifth, Sixth, and Eighth Circuits on the propriety of *Younger* abstention in cases raising preemption claims based on the "filed rate doctrine." [14] The Sixth Circuit, like the Fifth Circuit, has ruled in favor of *Younger* abstention (see *American Elec. Power Co.* v. *Kentucky Pub. Serv. Comm'n*, 787 F.2d 588 (1986), cert. denied, 481 U.S. 1023 (1987)),[15] but the Third and Eighth Circuits have rejected both *Burford* and *Younger* abstention (see *Kentucky West Va. Gas Co.* v. *Pennsylvania Pub. Utility Comm'n*, 791 F.2d 1111 (3d Cir. 1986); *Middle South Energy, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985), cert. denied, 474 U.S. 1102 (1986).[16]

[14] As described by this Court in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 962 (1986), the filed rate doctrine "holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates."

[15] The per curiam opinion for the Sixth Circuit in *American Electric Power* is unpublished. The court of appeals held that *Younger* abstention was required but that *Burford* abstention was not. Curiously, however, two judges of the three-judge panel sitting in that case filed separate concurring opinions in which each contended that *Burford* abstention was required.

[16] The preemption claim in *Middle South Energy, Inc.*, like the preemption claim in this case, arose out of FERC's allocation of the costs of the Grand Gulf I nuclear power facility; it involved the efforts of a state public service commission to shield the citizens of Arkansas from absorbing AP&L's FERC-allocated share of those costs.

Two Fourth Circuit decisions, both of which also involve the propriety of abstention in cases raising preemption claims based on the filed rate doctrine, further illustrate the scope of the current circuit conflict. In *Aluminum Co. of America* v. *Utilities Comm'n*, 713 F.2d 1024, 1030 (1983), cert. denied, 465 U.S. 1052 (1984)), the Fourth Circuit upheld abstention on *Burford* grounds after concluding that evaluation of plaintiff's claim—that the state commission's establishment of retail, intrastate rates conflicted with FERC-approved wholesale interstate rates—would require detailed factual inquiry. The court of appeals suggested, however, that abstention would not be appropriate in a case where the conflict between state and federal law was direct and clear (*ibid.*). In an action presumably based upon that caveat, the Fourth Circuit subsequently affirmed a district court's denial of both *Younger* and *Burford* abstention in the context of a preemption claim more akin to that present in this case (see *Appalachian Power Co.* v. *Public Serv. Comm'n*, 614 F. Supp. 64 (S.D. W. Va.), aff'd, 770 F.2d 159 (4th Cir. 1985), on remand, 630 F. Supp. 656 (S.D. W. Va. 1986), aff'd, 812 F.2d 898 (4th Cir. 1987)).

There is no merit, moreover, to respondents' contention (Br. in Opp. 13 (emphasis in original)) that a circuit conflict does not exist because "all the circuits that have considered the issue (including the Fifth Circuit) appear to agree • • • that they will not hesitate to exercise jurisdiction where the state and federal actions are in *direct* conflict and that conflict is readily discernible from the pleadings." Both the Sixth Circuit's decision in *American Elec. Power* and the Fifth Circuit's ruling in this case involved allegations of just such a direct conflict between federal and state law. Indeed, the Fifth Circuit in its decision below expressly assumed that the district court had

abstained even though "that [which] was not clear when *NOPSI I* was decided is now clear: the [Council's] Rate Order results in 'trapping' FERC allocated costs * * * [,] was based on factors that the state could not legally consider[,] and consequently * * * 'is beyond the Council's retail ratemaking authority and violates federal law' " (Pet. App. 11A).[17] Significantly, moreover, the Fifth Circuit, unlike respondents, readily acknowledged that a widespread circuit conflict exists on the propriety of abstention in these circumstances (see *id.* at 15A, 20A). Only respondents refuse to acknowledge the obvious.

b. We also continue to believe that the abstention issues are important. The circumstances that have given rise to the plethora of lower court decisions are likely to

[17] For this reason, respondents' effort (Br. in Opp. 24-27) to argue the merits of NOPSI's preemption claim is misguided. Whether a circuit conflict is presented depends on the court of appeals' reasoning, not respondents'. Both the court of appeals' and district court's opinions strongly suggest, moreover, that neither found much force in respondents' preemption arguments. As described by the district court (Pet. App. 30A), "the Council faults NOPSI not for buying a 'pig in a poke' but for failing to find a sucker to buy it when the faux-pas became apparent." The court added that it "is not ready to assume there are many, if any, such suckers purchasing electricity in the wholesale market today" (*id.* at 30A n.11). Finally, the district court commented on the Council's selection of "a figure of 8% for the prudence disallowance," explaining that "the Council, and in this case, everyone else knows that the 8% figure * * * represents the difference between FERC's 17% allocation and what NOPSI consistently claims as its relative share in the MSU system, i.e., 9%. Thus, the disallowed costs bear no apparent relationship to the savings NOPSI is said to have foregone" (*id.* at 30A-31A n.11).

Similarly, the court of appeals concluded that "the language of [the Supreme Court's opinion in *Mississippi Power & Light Co.*] seems to foreclose" the Council's inquiry into "NOPSI's asserted imprudence in failing to resell the power it had agreed to, and is now bound by the FERC order to, buy" (Pet. App. 13A).

persist. Utilities in neighboring states will continue to affiliate and enter into joint financing and power sharing arrangements in order to construct the more massive power production facilities necessary to meet increased demand. And, as happened with Grand Gulf 1, cost overruns and lower than predicted energy demand will sometimes strain those arrangements and continue to produce the type of interstate dispute that underlies the controversy presented in this case.

Resolution of the abstention issues also continues to be especially important to a fair resolution of these interstate disputes. As *NOPSI I* vividly illustrated, a utility's liability for wholesale rates may be immediate and ongoing, and a delay in passing those costs through in retail rates will often have consequences that are irreparable; it may create immediate cash flow problems and uncertainties that may threaten bankruptcy, impede securities offerings, and force compromise settlements (see pages 4, 7, *supra*). Because abstention, especially without consideration of appropriate preliminary relief, may contribute to, and even precipitate, this result, respondents' argument (Br. in Opp. 25), that this Court may determine the merits of the preemption claim on review of the decisions of the state tribunals, rings hollow.

3. Finally, this case presents an excellent vehicle for addressing the abstention issues. It is not blemished by the procedural problems present in *NOPSI I* because the settlement agreement entered into between the parties, which diminished the concreteness of the controversy in *NOPSI I,* is wholly incidental to this lawsuit. That agreement purported to preserve the Council's right to disallow NOPSI's right to recover certain Grand Gulf costs on the ground that they were imprudently incurred (see page 4, *supra*). This case concerns the lawfulness of the Council's exercise of that right.

The presence in this case of parallel state judicial proceedings does not render further review inappropriate (see note 6, *supra*). To be sure, those parallel proceedings suggest arguments of comity that were not present in *NOPSI I*. Moreover, the state courts may determine the merits while the federal proceedings are pending, possibly injecting issues of res judicata into any future federal court consideration of the preemption question. See *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 607-608 & n.19; see also *Kremer* v. *Chemical Constr. Co.*, 456 U.S. 461 (1982). The parallel state proceedings do not, however, change our views on the impropriety of federal abstention in this case and, more important, need not prevent this Court from addressing the fundamental question whether, at the time of the federal district court's decision, total abstention was appropriate. See *Pennzoil Co.* v. *Texaco, Inc.*, slip op. 15 ("In this opinion, we have addressed the situation that existed on the morning of December 10, 1985, when this case was filed in the United States District Court for the Southern District of New York."). Any issues of res judicata that may arise after that time may properly be addressed on remand.

Indeed, were the rule otherwise, the opportunity would seldom if ever arise for Supreme Court review of an abstention ruling in a case such as this. For, as long as the abstention issue remains unsettled, a federal plaintiff will, as in this case, be compelled to initiate a parallel state court proceeding in order to protect itself against the possibility of federal court abstention after the applicable state limitations period has run. We do not believe that action that a plaintiff must take in order to preserve its right to seek relief in some forum should deprive that plaintiff of the ability to seek Supreme Court review of its choice of a federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DAVID L. SHAPIRO
Special Assistant to the Attorney General

RICHARD J. LAZARUS
Assistant to the Solicitor General

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor
Federal Energy Regulatory Commission

DECEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—241 699 00005